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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1976

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NO. 75-6150

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CARDELL SPAULDING,
JOE LEE COBB and
VERNON RICHARD WALTERS

V.

STATE OF NORTH CAROLINA

****

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH CAROLINA

****

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The Attorneys for the Petitioners pray that a Writ of Certiorari issue to review the order of the Supreme Court of North Carolina entered on November 5, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ N. C. _____, 219 S E 2d 178 (1975) and is set out in Appendix A hereto, pp. 15 - 27, infra.

JURISDICTION

The opinion of the Supreme Court of North Carolina was entered on November 5, 1975. This Petition for Certiorari was filed within 90 days of

that date. The jurisdiction of this Court is involved under 28 U. S. C., § 1257 (3).

QUESTIONS PRESENTED

1. Does the imposition of the death penalty constitute cruel or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

2. Does the decision by the North Carolina Supreme Court reinstating the death penalty by judicial decision following FURMAN v GEORGIA, 408 U. S. 238 (1972), constitute an impermissible invasion of the FURMAN holding thereby violating the Eighth and Fourteenth Amendment requirements of lawful criminal punishment?

3. Does the finding by the North Carolina Supreme Court that, on four separate occasions during the trial below inadmissible evidence was introduced, which evidence, in the opinion of the Court, clearly violated Petitioner Spaulding's right of confrontation and cross examination as guaranteed by the Sixth and Fourteenth Amendments, constitute reversible error and did that and similar evidence prejudice the rights of Petitioners Cobb and Walters and constitute reversible error as to them?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. 1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S. E. 2d 19 (1973)

§ 15-187. Death by administration of lethal gas. - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT OF THE CASE

Cardell Spaulding, Joe Lee Cobb and Vernon Richard Walters were charged in separate bills of indictment with the first degree murder of James Thomas Griffiths on March 18, 1974, in Halifax County, North Carolina, under North Carolina General Statutes § 14 - 17. All of the Petitioners and the victim were inmates of Caledonia Prison on the date of the murder. The

trials of the three Petitioners were consolidated upon motion of the State and over the objection of each Petitioner, which trial was held during the November, 1974, Halifax County Superior Court Term. Each Petitioner entered a plea of not guilty and none of the Petitioners testified in their own behalf. The jury returned verdicts of guilty as charged in the indictments as to each Petitioner and the Trial Judge imposed the death penalty upon each of the Petitioners, to which the Petitioners entered objections based on the death penalty being a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The trial Court overruled each of these objections.

The Petitioners gave notice of appeal in open court after the Trial Judge imposed the death penalty, which appeal was perfected to the Supreme Court of North Carolina. On November 5, 1975, the Supreme Court of North Carolina affirmed the conviction of the Petitioners and found no error in the trial.

Attorneys for the undersigned Petitioners filed a request for a stay of execution with the Supreme Court of North Carolina on November 20, 1975, which was granted by the Supreme Court of North Carolina upon the condition that a Petition for a Writ of Certiorari be filed in this cause with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE PRESENTS THE FUNDAMENTAL QUESTION AS TO WHETHER THE IMPOSITION OF THE DEATH PENALTY UNDER A STATE STATUTE IS A VIOLATION OF THE UNITED STATES CONSTITUTION AS BEING A CRUEL OR UNUSUAL PUNISHMENT WHICH IS SPECIFICALLY PREVENTED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Petitioners submit that this Court should grant Certiorari in this case to consider directly the constitutionality of the death penalty. To take the life of an individual as punishment for an act declared by law to be

a crime is to compound the tragedy of the event. The death penalty is an end to all hope for the condemned for their rehabilitation. The rehabilitation of criminal offenders has historically been a goal of our nation and individual states.

The death penalty is not the most effective means for deterrents of crime. This can be readily ascertained by the fact that in the State of North Carolina alone there are one hundred three prisoners who have received sentences of death as of 20 January, 1976. Their numbers continue to grow.

The last execution carried out under a judgment imposing the death penalty in North Carolina was in 1962. Since then, public opinion against the death penalty has increased to the point that the question of whether that penalty is a violation of the United States Constitution must be decided. This petition presents that opportunity.

2.

THE COURT SHOULD GRANT CERTIORARI BECAUSE THIS CASE PRESENTS THE FUNDAMENTAL QUESTION OF WHETHER THE DECISION OF THE NORTH CAROLINA SUPREME COURT'S REINSTATEMENT OF THE DEATH PENALTY BY JUDICIAL DECISION FOLLOWING FURMAN V. GEORGIA, 408 U. S. 238 (1972), IS AN IMPERMISSIBLE EVASION OF THE FURMAN HOLDING THEREBY VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS OF LAWFUL CRIMINAL PUNISHMENT.

The Petitioners submit that this Court should grant Certiorari in this case because of the significance of the question and because the States are in disagreement as to the solution to this issue.

The murder for which defendants were convicted occurred on 18 March 1974, a date between 18 January 1973, the day of the decision in STATE V. WADDELL, 282 N. C. 431, 194 S. E. 2d 19, in which a majority of four members of the North Carolina Supreme Court interpreted the case of FURMAN V. GEORGIA, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346, (1972), and 8 April 1974, the day on which the General Assembly rewrote G. S. 14 - 17 by the enactment of Chapter 1201 of the Session Laws of 1973. The Statute under which defendants were charged, N. C. G. S. 14 - 17 reads as follows:

> "Murder in the first and second degree defined: Punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death; provided, if at the time of rendering its verdict in open Court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury. ..."

Petitioners maintain that it was initially for the General Assembly of North Carolina, rather than the Supreme Court of North Carolina, to determine as a matter of policy, whether and under what circumstances the death sentence should be reinstated in North Carolina after the holding by the United States Supreme Court in FURMAN V. GEORGIA that statutes such as the one under which these defendants were tried are constitutionally impermissible because, under these statutes, the decision as to whether a defendant's punishment would be imprisonment or death is left to the discretion of the jury, thus denying the defendant Equal Protection of the laws.

Throughout these fifty states there are undoubtedly many defendants, other than these three, who have been charged under statutes which were declared unconstitutional by the Supreme Court of the United States when the decision in FURMAN V. GEORGIA, Supra was handed down. The North Carolina Supreme Court has ruled, in agreement with the highest Courts in the other States which have statutes giving to the Judge or the jury the discretion to impose a sentence of life imprisonment or death, that the death penalty could not be constitutionally imposed for offenses committed prior to the initial application of FURMAN by the State Supreme Court to the existing statute. The State high courts have agreed that, if a punishment, for murder, of life imprisonment or death were changed to death alone, the latter penalty could hardly be applied to a homicide committed before the change. The constitutional ban against the increase of punishment has been held to apply against judicial as well as

legislative action. STATE V. WADDELL, Supra, BONIE V. COLUMBIA, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

However, the States are in disagreement as to the effect of FURMAN on offenses committed after the first application of FURMAN to State law. The Supreme Court of North Carolina has held that FURMAN merely prohibits the elements of discretion inherent in the proviso to the North Carolina statute which had allowed the jury to mercifully intervene and impose a sentence of life imprisonment rather than the death penalty. The North Carolina Court remedied this problem by striking the element of mercy and by leaving the death penalty as the mandatory punishment. The four man majority reasoned that the mercy proviso was added in 1949 to an existing statute providing for mandatory death. They stated that although this deletion would broaden the punitive effect, there was no violation of the ex post facto provisions of the constitution because the severed portion had been previously added by way of amendment and because the result was the same as the statute had read prior to the amendment. Thus, the statute, after judicial action, embodied a policy which had been accepted by the legislature at some point in time. The court cited FROST V. CORPORATION COMMISSION, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929) dealing with an Oklahoma statute which required a special certificate to operate a cotton gin, but which added by way of amendment a proviso excepting gins operating as cooperatives. The Oklahoma Court's decision to strike this proviso was upheld although the effect was to broaden the application of the statute. The basis for this decision as stated was that the statute had originally been enacted without the proviso by a prior legislature.

The North Carolina Court also referred to the case of UNITED STATES V. JACKSON, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d. 138 (1968) where the United States Supreme Court severed and declared invalid a proviso of the federal kidnapping act where the jury was allowed to recommend the death penalty

when the original statute provided for only life imprisonment. Note, however, that this is a narrowing rather than a broadening of the statute's punitive effect. The court quoted CHAMPLIN ROOFING COMPANY V. COMMISSION, 286 U. S. 210, 234, 52 F. Ct. 559, 76 L. Ed 1062, where it was held that the unconstitutional parts of a statute do not defeat the constitutional parts unless it is clear that the legislature would not have enacted the valid parts but for the invalid parts. The question seems to be whether the provisions of the North Carolina Statute and the statutes of other states embody an individual and unified plan for punishment. Petitioners maintain that FURMAN did not purport to delete, isolate, or invalidate any particular portion of these statutes. FURMAN simply held that the death penalty provision under the statutes as now constituted is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

Many states statutes similar to those of North Carolina involving the death penalty have been reviewed and reconsidered since the FURMAN decision. Ohio, Mississippi, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Virginia and Florida have said that under their statutes the death penalty cannot be imposed. Many of these cases did not consider directly the question of whether the court could eliminate the forbidden discretion and impose a mandatory death penalty in future cases. However, as the former Chief Justice Bobbirt and the present Chief Justice Sharp of the North Carolina Supreme Court have pointed out, the language used in the cases has been very broad in scope indicating that the death penalty could not be enacted under the statutes without some legislative change. Chief Justice Roberts of the Supreme Court of Florida said "This question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense there can be no capital penalty. " STATE V. WHALEN, 269 S. 2d 678, 679 (1972). Thus, Florida has indicated that FURMAN ties the hands of

that court to impose the death penalty.

The Pennsylvania Court has also interpreted FURMAN as eliminating the possibility of a death penalty in Pennsylvania under their current statute which is similar to that of North Carolina. COMMONWEALTH V. TRUESDALE, Pa., 296A. 2d. 829 (1972). The Pennsylvania defendant Truesdale applied for bail after the FURMAN decision, and the Pennsylvania Supreme Court held that there could be no capital cases in Pennsylvania after the FURMAN decision under the current Pennsylvania statutes which gave to the jury the discretion to determine whether punishment should be death or life imprisonment. It would seem, therefore, that the Florida and Pennsylvania courts agree with the dissenting members of the North Carolina court in STATE V. WADDELL, Supra, and STATE V. JARRETTE, 284 N. C. 625, 202 S. E. 2d 721 (1974).

Consider, however, the Delaware decision in DELAWARE V. DICKERSON, Del. Supr., 298 A. 2d. 761 (1972). 11 Del. C. Section 571 provided that whoever committed the crime of first degree murder as defined therein "shall suffer death". 11 Del. C. Section 3901 provided: "In all cases where the penalty for crimes prescribed by the laws of this State is death, if the jury, at the time of rendering the verdict, recommends the defendant to the mercy of the court, the court may, if it seems proper to do so, impose the sentence of life imprisonment instead of death". The Delaware Supreme Court held that the discretionary mercy provision of 11 Del. C. Section 3901 are unconstitutional under FURMAN, but that the mandatory death penalty prescribed in 11 Del. C. Section 571 is nevertheless constitutional. Former Chief Justice Bobbitt noted, however, in his dissenting opinion in STATE V. JARRETTE, Supra, that at the time the opinion was written there had been no decision of the Supreme Court of Delaware since FURMAN which sustained the death sentence. It would seem, therefore, that North Carolina and Delaware courts have determined that FURMAN does not necessarily invalidate the death penalty under statutes which leaves the imposition of life imprisonment or death to the discretion of the jury. However, Pennsylvania, Florida, and,

arguably, many other states have held to the contrary that under these discretionary statutes the death penalty can under no circumstances be imposed. Because of this conflict among the states petitioners ask that the court grant certiorari to determine whether the decision of the North Carolina Supreme Court re-instating the death penalty is an impermissible evasion of the FURMAN holding and whether such a re-instatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishment. The trend today is to lessen the application of capital punishment rather than to extend it, and it would seem that the re-instatement of the death penalty contradicts this trend and evades the spirit and essence of the FURMAN holding. It is noteworthy that the State of North Carolina, with its rather unique interpretation of FURMAN, is responsible for approximately one-fourth of the inmates currently on death row throughout the nation. As the members of the Supreme Court of North Carolina stand divided, the high courts of the various states also disagree. The State Courts, these Petitioners, and many other deathrow defendants look to this Court for guidance.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE NORTH CAROLINA SUPREME COURT IN ITS DECISION ADMITS THAT ON FOUR SEPARATE TIMES DURING THE COURSE OF THE TRIAL, EVIDENCE NOT ADMISSIBLE AS AGAINST DEFENDANT SPAULDING WAS ADMITTED AND THAT "ITS ADMISSION CLEARLY VIOLATED HIS RIGHT OF CONFRONTATION AND CROSS-EXAMINATION GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES." INCRIMINATING STATEMENTS AS TO DEFENDANTS WALTERS AND COBB WHICH WERE ADMITTED INTO EVIDENCE AND RULED UPON BY THE NORTH CAROLINA SUPREME COURT AS HARMLESS ERROR SHOULD ALSO BE REVIEWED BY THIS COURT.

The North Carolina Supreme Court summarized all the Defendants' contentions of error in admitting evidence which they contended violated their constitutional rights of confrontation and cross-examination as follows:

> "Subsection A: In the early portion of the testimony of the witness Sarakby, he related that in the presence of James Cobb and the witness that defendant Walter said, "We are going to get him that so and so. We are going to get that Son of a Bitch." Whereupon Walters put a knife in his pants and left. Cobb then put a knife in his shirt and said, "I won't let him go alone. Stay there. Don't go anywhere." Only Cobb and Walters were present when these statements were made to Sarakby.
>
> Subsection B: The solicitor inquired whether Walters or Cobb had told the witness why they were going to get James Griffiths. The witness responded that Walters had told him that James Griffiths had "told the man about the robbery they had on the week before." The record does not disclose whether anyone was present other than the witness and Walters on this occasion.
>
> Subsection C: Walters stated to Sarakby "I want you to do me a favor and to do Joe Cobb a favor... we don't want you talking to no blacks whatsoever." The record does not show that anyone was present at this time except the witness and Walters; however, shortly thereafter the same admonition was repeated by Walters in the presence of Cobb who did not comment.
>
> Subsection D: The witness Sarakby testified that Cobb, covered with blood, walked quickly back to the dormitory and at that time the witness asked Cobb what happened. Cobb replied, "We got him, he is dead, we killed him." The witness inquired "Where was it?" and Cobb replied "In the library " At the same time, Cobb asked the witness Sarakby to go help Walters. No one was present at this time except Cobb and the witness.
>
> Subsection E: The witness Sarakby further testified:
>
> After headcount Buckwheat (Walters), Joe Lee Cobb, Cardell Spaulding and me went to the game room and sat at the same table. There were more guys with us. Billy Spaulding told Joe Cobb, "Joe, we got him, he is dead, we have killed him, so we ain't got to worry about his talking, ain't nobody going to talk."

Q. All right, go ahead.

A. At this time, I turned around and asked Walter Vernon (Walters), who was sitting to my right, if Billy Spaulding had anything to do with the murder. He said, "Yes, he had, just don't say anything about it, you know, we are not supposed to tell anybody about it."

Q. What else did he say"

A. He just said that Bill Spaulding---Billy Spaulding was sitting on my left and he was talking to some other guys sitting at the table over there. He said, "Keep your mouth shut, you ain't seen nothing and you ain't heard nothing. We got him, we killed him, and he is gone, so we ain't going to worry about him no more." That is what he said.

Subsection F: The witness Lindsay, after testifying that he saw Walters and Cobb beating on a man in the library, said that shortly thereafter he observed Walters and Cobb and Spaulding, followed by Sarakby, coming from the direction of the library. He stated that Spaulding, Cobb and Walters were bloody and as they passed by, Walters said, "We just killed a Goddamned man in the library." At that time, all three defendants were together and Cobb and Spaulding remained silent."

The Court in commenting on Spaulding's contentions that the admissions violated his constitutional right of confrontation and cross-examination said: "When read contextually the statements summarized in Subsection A through D do not in any way implicate Spaulding. The "we's" and "they's" seem to refer only to Cobb and Walters. Spaulding is never mentioned by name."

In overruling the State's contention of an implied admission the North Carolina Supreme Court said:

"Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission." (Citations omitted.)

The Court after all of the above findings of inadmissible evidence, then concluded that "the evidence which violated Spaulding's Sixth Amendment rights of confrontation and cross-examination was rendered harmless beyond a reasonable doubt." Brown v. United States, 411 U.S. 223, 36 L. Ed. 2d 208, 93 S. Ct. 1565; Schneble v. Florida, 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056, Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d. 705, 87 S. Ct. 824.

The North Carolina Supreme Court's final decision was clearly in error. To say that four items of inadmissible evidence "clearly violated his right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States" but then rule that such evidence "was rendered harmless beyond a reasonable doubt" is to completely ignore the entire constitution and the rights of individuals.

We are not here dealing with the three defendants' rights to a fair or perfect trial, but their right to live. It is not moral turpitude or a misdemeanor. It is not right or wrong. It is life or death.

The jurors who passed on the guilt or innocence of the three defendants did not have the legal training, years of experience and time and research that was available to the members of the North Carolina Court. Their untrained minds were more easily tarnished and prejudiced by the incompetent evidence presented to them on at least four occasions. How many times would the North Carolina Court allow incompetent evidence before it would find it "harmful error"?

The United States Supreme Court should set forth guidelines for this and other cases. The death penalty may be cruel and unusual punishment, in many cases, but it is even more so when the highest State Court finds highly prejudical and inadmissible evidence was presented to the jury at least four times, but still leaves standing a death sentence.

CONCLUSION

For the foregoing reason, this Court is respectfully requested to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

STATE of North Carolina

v.

Cardell SPAULDING et al.

No. 4.

Supreme Court of North Carolina.

Nov. 4, 1975.

Defendants were convicted in the Superior Court, Halifax County, Robert D. Rouse, Jr., J., of first-degree murder, and they appealed. The Supreme Court, Branch, J., held, inter alia, that it was not prejudicial error to admit various statements and admissions made by codefendants; that the evidence supported defendants' convictions; that various evidentiary rulings of the trial court were correct; and that imposition of the death penalty was not cruel and unusual punishment.

No error.

Sharp, C. J., and Copeland and Exum, JJ., dissented as to death sentence and filed separate opinions.

1. Criminal Law ⇐407(2)

While implied admissions are received with great caution, if statement is made in person's presence by person having first-hand knowledge that denial would be naturally expected if statement were untrue and it is shown that he was in position to hear and understand what was said and had opportunity to speak, then his silence or failure to deny renders statements admissible against him as implied admission.

2. Criminal Law ⇐662(1)
Witnesses ⇐266

Where evidence implicating codefendant in consolidated murder prosecutions was not such as would be admissible as against said codefendant as implied admission, its admission violated codefendant's right of confrontation and cross-examination. U.S.C.A.Const. Amends. 6, 14; G.S. § 15-152.

3. Criminal Law ⇐1169.12

In view of probative value of other competent evidence admitted against codefendant in consolidated murder prosecutions, admission of statements implicating codefendant, although it violated codefendant's rights of confrontation and cross-examination, was harmless error. U.S.C.A. Const. Amends. 6, 14; G.S. § 15-152.

4. Criminal Law ⇐407(2)

Where statements implicating codefendant in murder prosecution, admitted in evidence during trial, were such that codefendant, being present when such statements were allegedly made, would naturally have denied such statements if they were untrue, evidence of such statements was admissible as implied admission of codefendant.

5. Criminal Law ⇐662(1)
Witnesses ⇐266

Where evidence of statements concerning codefendant, introduced in consolidated murder prosecution, did not have effect of incriminating codefendant, their admission did not violate codefendant's rights of cross-examination and confrontation. U.S.C.A.Const. Amends. 6, 14; G.S. § 15-152.

6. Homicide ⇐250

Evidence supported conviction of prison inmates for stabbing murder of fellow inmate.

7. Criminal Law ⇐675

In prosecution for stabbing murder of prison inmate, witness' description of blood surrounding decedent's body was admissible despite contentions that testimony was repetitious.

8. Criminal Law ⇐675

Although evidence of admitted fact may sometimes be properly excluded, stipulation as to cause of death may not be used to prevent state from proving all essential elements of its theory of case.

9. Criminal Law ⇐675

Trial judge in murder prosecution did not err in allowing testimony of two physicians as to cause of decedent's death, despite fact that defendants were willing to stipulate that death was caused by multiple stab wounds, where testimony had relevance beyond facts to which defendants were willing to stipulate in that evidence was competent to show use of different instruments, thereby supporting inference that wounds were inflicted by two or more persons.

10. Homicide ⇐14(1)

Use of grossly excessive force or delivering of lethal blows after deceased has been felled are among circumstances to be considered in determining whether killing is done with premeditation and deliberation.

11. Criminal Law ⇐438(7)

In prosecution for murder of prison inmate by stabbing, photographs illustrating experts' testimony as to cause of death were properly admitted over defendants' objections that photographs would inflame jury.

12. Criminal Law ⇐451(1)

Witness may state instantaneous conclusions of mind as to appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of variety of facts presented to senses at one and the same time.

13. Criminal Law ⇐451(3)

In prosecution of prisoner inmates for stabbing death of fellow inmate, witness' description of one defendant, to effect that "he was bloody like he had been to a slaughter," was admissible under "shorthand statement of facts" exception to opinion evidence rule.

14. Criminal Law ⇐693

Assignment of error directed to testimony of witness was deemed waived where defendants did not object to testimony until after answer had been received, even though grounds for objection were obvious after question had been asked.

15. Witnesses ⇐284

Defendants in murder prosecution were not denied their right to full and fair cross-examination by virtue of fact that state's witness had first refused to answer several questions put him on cross-examination, where witness did freely respond to questions in further cross-examination and insignificance of early refusals was highlighted by failure of defense counsel to attempt to "sift" witness.

16. Criminal Law ⇐783½, 1144.15

When motion to strike testimony is granted, trial judge should instruct jury to disregard stricken evidence; it is presumed that jury will follow such instructions.

17. Criminal Law ⇐783½

Trial judge in murder prosecution, in instructing jury to disregard witness' testimony that one defendant looked "like he had been to a hog killing," did not err in repeating objected-to statement in exact words of witness, since such repetition was necessary so that jury would clearly understand portion of evidence which it should not consider in reaching its verdict.

18. Criminal Law ⇐629

It is within discretion of trial judge to decide whether witness shall testify when his name does not appear on list of witnesses which state elects to furnish defense counsel prior to trial; judge's ruling will not be reversed absent abuse of discretion.

19. Criminal Law ⇐629

Where witness is tendered who does not appear on list of witnesses furnished defense counsel by state, better practice is for court, before ruling on admissibility of witness' testimony, to interrogate jurors as to their relationship with tendered witness.

20. Criminal Law ⇐1166(11)

Defendants in murder prosecution were not prejudiced by court's action in allowing

state to present witnesses whose names had not been furnished to defense counsel prior to jury selection where testimony given by such witnesses did not relate to essential elements of crime charged, but only to discovery of and chain of custody as to certain exhibits. G.S. § 15A 903.

21. Witnesses ⇐349

Witness may be cross-examined by asking disparaging questions concerning collateral matter relating to his criminal or degrading conduct; however, questions must be asked by solicitor in good faith.

22. Witnesses ⇐267

Limits of proper cross-examination are largely within discretion of trial judge, and his rulings thereon will not be held to be error in absence of showing that jury verdict was improperly influenced thereby.

23. Criminal Law ⇐1170½(2)

Where solicitor's cross-examination of witness by asking about witness' participation in alleged prior crime concerned matter collateral to murder prosecution in which cross-examination took place, witness' negative answer was conclusive and rendered question harmless.

24. Criminal Law ⇐633(1), 1152(1)

It is duty of trial judge, in exercise of its discretion, to regulate conduct and course of business during trial; exercise of this discretion will not be reviewed absent showing of abuse of discretion.

25. Criminal Law ⇐633(1)

Trial judge in murder prosecution did not abuse discretion in permitting use of armed prison guards and allowing presence of armed officers in and around courthouse and in presence of jury during course of murder trial where defendants were prison inmates and many of the witnesses were persons convicted of murder and other felonies.

26. Criminal Law ⇐1213

Imposition of death penalty on prison inmates convicted of murder of fellow inmate did not constitute cruel or unusual punishment. U.S.C.A.Const. Amends. 8, 14.

Defendants Cardell Spaulding (Spaulding), Joe Lee Cobb (Cobb) and Vernon Richard Walters (Walters) were charged in separate bills of indictment with the first-degree murder of James Thomas Griffiths on the 18th day of March 1974. Walters was also referred to in the record as "Buckwheat" and "Walter Vernon." The charges were consolidated for trial upon motion of the State and over the objection of each defendant. After being duly arraigned, each defendant entered a plea of not guilty.

The State's evidence tended to show that on the 18th day of March at about 6:40 p. m. a custodial officer at Caledonia Prison Farm discovered the body of James Thomas Griffiths lying in a pool of blood in the prison library. The officer observed numerous stabs and cuts upon Griffiths' body. Griffiths was carried to the Scotland Neck Community Hospital where Dr. G. V. Byrum conducted an examination. Dr. Byrum testified that his examination disclosed that Griffiths died as a result of multiple stab wounds in the chest and abdomen. He found more than forty different wounds on the body. Dr. Joseph H. Harmon, a pathologist who conducted a post-mortem examination, confirmed Dr. Byrum's conclusion as to the cause of death.

The State relied heavily upon the testimony of Sharif Sarakby and Haywood Lindsay who were prisoners at Caledonia Prison Farm on 18 March 1974.

Sarakby testified that on 18 March 1974 he was in the Prison Farm dormitory when Walters left the dormitory armed with a knife avowing that he was going to "get" Thomas Griffiths because, according to Walters, he had told a prison guard that "they" were connected with a prison robbery. Cobb, also armed with a knife, shortly thereafter left the dormitory after indi-

eating he was going to join Walters. The witness later saw Cobb and Walters and they were both covered with blood. He helped Walters remove and dispose of identifying patches from his bloody clothes. While he was performing this task, defendant Spaulding entered the room. His clothes were "messed up," but the witness did not observe any blood on Spaulding's clothes.

Haywood Lindsay, in essence, testified that shortly after supper he saw Walters and Cobb in the prison library. They were "bent over beating on a guy . . ." The witness left the vicinity of the library and a short time thereafter he saw defendant Spaulding who "had blood all over him." He related that Spaulding pushed him over as he went by and that Spaulding was followed by Walters, Cobb and Sarakby in that order. Cobb and Walters were bloody. Walters tried to stab him with a shank (a homemade knife), but made no further efforts after Sarakby pleaded for no further violence.

George Marshall testified that on 18 March 1974, at about 10:30 p. m., he found State's Exhibit 10, identified as trousers belonging to Walters and State's Exhibit 5, a knife identified as belonging to Walters, in a trash can in the hallway near the canteen. He also found other items of clothing, two knives and two name tags and "to the best of his knowledge" one of the name tags bore the name Sarakby. All of these items were given to S.B.I. Agent McMahan.

Ervin Eugene Warrick, a maintenance supervisor at Caledonia Prison during the year 1974, testified that on the 18th, 19th or 20th of March he found a pair of cut-up pants and a name tag bearing the name Spaulding in the sewer line. These items were delivered to S.B.I. Agent McMahan.

The State offered the testimony of S.B.I. Agent McMahan for the purpose of corroborating the testimony of Sarakby and Lindsay and for the purpose of showing chain of custody of certain exhibits.

There was further evidence that Griffiths' blood type was O and that Walters' knife, State's Exhibit 5, had blood on it but there was not a sufficient amount to identify the type. Examination of Vernon Walters' identification patch revealed Type O blood. Tests performed on Walters' pants, shirt and shoes, State's Exhibits 11, 13, and 12, established the presence of Type O blood. Examination of Exhibits 14 and 15, Cobb's shoes and shirt, also disclosed Type O blood.

None of the defendants testified but offered evidence tending to show that each of them was either on the basketball court or in Cell Block 2-A playing poker in the presence of other inmates. Cobb also presented evidence to show that a cut on his left index finger was a result of an accident which occurred in the laundry room on the day of the killing. Walters offered evidence to show that a cut found on his leg occurred while he was working with a shovel on the prison farm.

The jury returned verdicts of guilty as charged in the indictments as to each defendant. Defendants appealed.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Lester V. Chalmers, Jr., Raleigh, for the State.

W. Lunsford Crew, Roanoke Rapids, for defendant-appellant Spaulding.

William F. Dickens, Jr., Enfield, for defendant-appellant Cobb.

H. P. McCoy, Jr., Scotland Neck, for defendant-appellant Walters.

BRANCH, Justice.

Defendants assign as error the ruling of the trial judge allowing the cases to be consolidated for trial. Each defendant contends that his constitutional right of confrontation and cross-examination as guaranteed by the Sixth Amendment to the United States Constitution was violated by the reception of evidence of admissions by one of his codefendants which implicated

him in the crime charged which evidence was inadmissible against him.

The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. G.S. 15-152; *State v. Parker*, 271 N.C. 414, 156 S.E.2d 677; *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 586, cert. denied, 384 U.S. 1020, 86 S.Ct. 1936, 16 L.Ed.2d 1044; *State v. Morrow*, 262 N.C. 592, 138 S.E.2d 245; *State v. White*, 256 N.C. 244, 123 S.E.2d 483. We are advertent to the repeal of G.S. 15-152, effective 1 July 1975. The repealing act is applicable to all criminal proceedings begun on or after that date. N.C.Sess.Laws ch. 1286 (1973). This trial was held before the effective date of this repealing legislation.

Prior to the decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, the general rule was that the admission of extrajudicial confessions of one codefendant, even though it implicated another against whom it was inadmissible, was proper when the trial judge instructed the jury that the evidence was admitted only against the defendant making the confession and must not be considered by the jury in any manner in determining the charge against his codefendant(s). *State v. Lynch*, 266 N.C. 584, 146 S.E.2d 677; *State v. Tatorn*, 268 N.C. 445, 150 S.E.2d 779; *State v. Arnold*, 258 N.C. 563, 129 S.E.2d 229, rev'd on other grounds, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77. The decision in *Bruton* complicated joint trials. The essence of the holding in *Bruton* is that the admission of a confession implicating a codefendant violates the non-confessing defendant's Sixth Amendment rights of confrontation and cross-examination unless the confessor takes the stand so as to be subjected to cross-examination.

The landmark North Carolina case interpreting *Bruton* is *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492. There Justice Sharp (now Chief Justice) speaking for the Court stated:

> . . . [i]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra* [250 N.C. 113, 108 S.E.2d 128]), and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation. See *State v. Kerley, supra*, 246 N.C. 157, at 160, 97 S.E.2d 876, at 879.

Accord: *State v. Parrish*, 275 N.C. 69, 165 S.E.2d 230; *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481; *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39. We note parenthetically that the majority of our cases interpreting the *Bruton* rule refer to in-custody *confessions*; however, the rule as stated in *Bruton* and *Fox* applies with equal force to *admissions* by a defendant which implicate another against whom the evidence is inadmissible. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858; *Bruton v. U. S.*, supra; 2 Stansbury's N.C. Evidence, § 182, pp. 62-63 (Brandis Rev. 1973).

Obviously some of the statements challenged by defendants offend the *Bruton* rule and constitute prejudicial error unless the statements are competent against the nondeclarants or unless the total evidence is so overwhelming that the erroneous admission is harmless beyond a reasonable doubt. *State v. Davis* and *State v. Fish*, 284 N.C. 701, 202 S.E.2d 770.

In order to avoid repetition as we consider each respective defendant's contentions under this assignment of error, we summarize the portions of the record con-

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taining admitted evidence which defendants contend violated their constitutional rights of confrontation and cross-examination:

Subsection A: In the early portion of the testimony of the witness Sarakby, he related that in the presence of James Cobb and the witness that defendant Walters said, "We are going to get him, that so and so. We are going to get that Son of a Bitch." Whereupon Walters put a knife in his pants and left. Cobb then put a knife in his shirt and said, "I won't let him go alone. Stay there. Don't go anywhere." Only Cobb and Walters were present when these statements were made to Sarakby.

Subsection B: The solicitor inquired whether Walters or Cobb had told the witness why they were going to get James Griffiths. The witness responded that Walters had told him that James Griffiths had "told the man about the robbery they had on the week before." The record does not disclose whether anyone was present other than the witness and Walters on this occasion.

Subsection C: Walters stated to Sarakby "I want you to do me a favor and to do Joe Cobb a favor . . . we don't want you talking to no blacks whatsoever." The record does not show that anyone was present at this time except the witness and Walters; however, shortly thereafter the same admonition was repeated by Walters in the presence of Cobb who did not comment.

Subsection D: The witness Sarakby testified that Cobb, covered with blood, walked quickly back to the dormitory and at that time the witness asked Cobb what happened. Cobb replied, "We got him, he is dead, we killed him." The witness inquired "Where was it?" and Cobb replied "In the library." At the same time, Cobb asked the witness Sarakoy to go help Walters. No one was present at this time except Cobb and the witness.

Subsection E: The witness Sarakby further testified:

After headcount Buckwheat [Walters], Joe Lee Cobb, Cardell Spaulding and me went to the game room and sat at the same table. There were more guys with us. Billy Spaulding told Joe Cobb, "Joe, we got him, he is dead, we have killed him, so we ain't got to worry about his talking, ain't nobody going to talk."

Q. All right, go ahead.

A. At this time, I turned around and asked Walter Vernon [Walters], who was sitting to my right, if Billy Spaulding had anything to do with the murder. He said, "Yes, he had, just don't say anything about it, you know, we are not supposed to tell anybody about it."

Q. What else did he say?

A. He just said that Billy Spaulding—Billy Spaulding was sitting on my left and he was talking to some other boys sitting at the table over there. He said, "Keep your mouth shut, you ain't seen nothing and you ain't heard nothing. We got him, we killed him, and he is gone, so we ain't going to worry about him no more." That is what he said.

Subsection F: The witness Lindsay, after testifying that he saw Walters and Cobb beating on a man in the library, said that shortly thereafter he observed Walters and Cobb and Spaulding, followed by Sarakby, coming from the direction of the library. He stated that Spaulding, Cobb and Walters were bloody and as they passed by, Walters said, "We just killed a Goddamned man in the library." At that time, all three defendants were together and Cobb and Spaulding remained silent.

We first consider whether the admission into evidence of these various statements and admissions of other codefendants violated defendant Spaulding's constitutional right of confrontation and cross-examination. When read contextually the statements summarized in Subsections A through D do not in any way implicate Spaulding. The "we's" and "they's" seem to refer only to Cobb and Walters. Spaulding is never mentioned by name. See *State*

v. *Jones*, 280 N.C. 322, 185 S.E.2d 858. However, in a later portion of the testimony of the witness Sarakby the record shows that Walters made a statement implicating Spaulding while Spaulding, Cobb and Walters were sitting at a table in the game room. The circumstances under which this statement was made are fully set forth in Subsection E. The State takes the position that the *Bruton* rule does not apply because the evidence was admissible as an implied admission since Spaulding was present and failed to deny any complicity in the murder.

[1, 2] Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. 2 Stansbury's N.C. Evidence, § 179, p. 50 (Brandis Rev. 1973). *State v. Moore*, 262 N.C. 431, 137 S.E.2d 812; *State v. Guffey*, 261 N.C. 322, 134 S.E.2d 619; *State v. Bryant*, 235 N.C. 420, 70 S.E.2d 186, and *State v. Wilson*, 205 N.C. 376, 171 S.E. 338. It is true that the statement implicating defendant Spaulding was made in his presence, but it was not shown that he was in a position to hear or understand the statement made by Walters. In fact, the State's evidence shows that at the time statement was made, Spaulding was "talking to some other guys sitting at the table over there." A denial could not be expected under these circumstances and this evidence was not admissible as an implied admission. Since the evidence was not admissible as to Spaulding, its admission clearly violated his right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. There remains, nevertheless, the question of whether the erroneous admission of this evidence was harmless error beyond a reasonable doubt.

In *State v. Jones*, supra, Chief Justice Bobbitt wrote:

> . . . [I]n each case the prejudicial impact of testimony of out-of-court declarations of a codefendant, even when the right to confrontation is afforded, must be evaluated in the light of the competent admitted evidence against the nondeclarant defendant referred to in such declarations. We do not foreclose the possibility that the gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. No such gap exists in the present case.

Here the weight of the evidence erroneously admitted against Spaulding must be evaluated in light of the competent evidence admitted against him.

In essence, the competent evidence against Spaulding was as follows: The witness Sarakby stated that he heard Spaulding tell Cobb "Joe, we got him, he is dead, we have killed him, so we ain't got to worry about him talking, ain't nobody going to talk." The witness Lindsay saw Spaulding in the hallway shortly after he saw Cobb and Walters beating a man in the library and at that time Spaulding had blood all over him. Cobb and Walters were behind Spaulding and both of them were covered with blood. The witness Lindsay heard Walters, in the presence of Spaulding, state "We just killed a Goddamned man in the library." Spaulding made no denial or explanation as to this statement. Thereafter Spaulding's name tag was found with some cut-up trousers in a sewer line.

[3] When we evaluate the probative value of the competent evidence admitted against Spaulding as compared to the admissions of other codefendants admitted into evidence which were not competent against him, we conclude that the evidence

which violated Spaulding's Sixth Amendment rights of confrontation and cross-examination was rendered harmless beyond a reasonable doubt. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208; *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340; *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

We next consider whether there was prejudicial error as to defendant Walters in the admission of the statements challenged by this assignment of error.

[4] The record discloses that defendant Walters was present under such circumstances that a denial would be naturally expected if the statement made was untrue when the statements summarized in Subsections A, B, C and E were made. Thus his silence under the circumstances shown by the record amounted to implied admissions and this evidence was competent as to him. Walters was not present when Cobb made the admission set out in Subsection D to the effect that "We got him . . . . We killed him. He's dead." Neither was he present when Cobb told Sarakby "to go help Walter Vernon." These admissions were received in violation of Walters' constitutional rights of confrontation and cross-examination. However, the State presented competent evidence tending to show that: (1) Walters was seen beating a man in the library shortly before Griffiths' bloody body was discovered, (2) he was seen covered with blood near the scene of the killing and at that time declared "We have just killed a Goddamned man in the library." (3) shortly before the body of Griffiths was discovered Walters declared he "was going to get that S.O.B."

The mass of evidence against defendant Walters was so great that any incrimination by the statements of his codefendants was rendered harmless beyond a reasonable doubt.

[5] Finally, we consider the admission of the challenged statements as to defendant Cobb. The only statements which tend to violate Cobb's constitutional rights to confrontation and cross-examination are contained in Subsections B and C. In connection with the statements made in Subsection B, the record indicates only that *Walters* was mad with Griffiths because he had told the man about the robbery they had on the week before. Cobb was not named as one participating in the robbery or as having a grudge against Griffiths. Nowhere in the record was there anything which connects this statement with Cobb. We do not think that Cobb was incriminated by the statements contained in Subsection B. The remaining statement which might have violated the *Bruton* rule as to Cobb, at most, implied that Cobb and Walters had *some* criminal plans. Even if we concede, which we do not, that these statements did implicate Cobb, the overwhelming evidence against him convinces us that the admission of such evidence was harmless error beyond a reasonable doubt. Competent evidence against Cobb tends to show the following: Cobb was identified by an eyewitness as one of the men he saw beating on a man in the library a short time before Griffiths' bloody body was discovered. Cobb, armed with a knife, stated that he was going to join Walters immediately after Walters left his presence after saying, "We are going to get that S.O.B." Cobb was seen near the library covered with blood a short time before the discovery of Griffiths' body. While washing blood from his person, he told Sarakby "We got him, he is dead. We killed him." He also directed Sarakby to go and help the bloody Walters.

For the reasons stated, we hold that the trial judge did not err when he allowed the State's motion to consolidate the cases for trial.

[6] Each defendant contends that the trial judge erred in overruling his motions for judgment as of nonsuit at the conclusion of the State's evidence and at the conclusion of all of the evidence.

The rules governing consideration of the evidence upon a motion for judgment as of

nonsuit and the sufficiency of the evidence to withstand such motion are clearly stated by Justice Lake in the case of *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755, as follows:

> Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purpose of this motion, they are to be deemed by the court as if resolved in favor of the State. In determining such motion, incompetent evidence which has been admitted must be considered as if it were competent. [Citations omitted.]
>
> The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct, or both. There is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw a reasonable inference of each such fact from the evidence. If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of nonsuit should be allowed. [Citations omitted.]

In view of the detailed recitation of the evidence as to each defendant in our consideration of the preceding assignment of error we do not deem it necessary to again review the State's evidence. Suffice it to say that upon applying the above-stated rules we conclude that there was ample evidence to carry the case to the jury as to each defendant.

[7] Defendants next contend that the court erred in allowing William Bryant to describe the blood he observed on the floor where the deceased was found. Objection to the question eliciting William Bryant's description of the blood surrounding the decedent's body was lodged on the ground that the testimony would be repetitious. Our examination of the record does not reveal any occasion on which similar testimony had been elicited. This evidence was clearly relevant and material, particularly in light of other evidence placing the blood covered defendants near the scene of the killing. This evidence was properly admitted. See *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141.

[8, 9] Defendants argue that the trial judge erred in allowing the testimony of two physicians as to the cause of decedent's death when all defendants were willing to stipulate that Griffiths' death was caused by multiple stab wounds. Although there is authority for the proposition that evidence of an admitted fact may be properly excluded, a stipulation as to the cause of death may not be used to prevent the State from proving all essential elements of its theory of the case. *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745. The expert testimony had relevance beyond the facts to which defendants were willing to stipulate in that the evidence was competent to show the use of different instruments, thereby supporting an inference that the wounds were inflicted by two or more persons.

[10] The use of grossly excessive force or the delivering of lethal blows after a deceased has been felled are among the

circumstances to be considered in determining whether a killing is done with premeditation and deliberation. Therefore, this evidence was also admissible for the purpose of proving premeditation and deliberation.

[11] The photographs illustrating these experts' testimony were also properly admitted over defendants' objections. It has long been the rule in this State that "[r]elevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." 1 Stansbury, supra at § 80, p. 242. In *State v. Cutshall*, supra, this Court stated:

> Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony. *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241; *State v. Porth*, 269 N.C. 329, 153 S.E.2d 10; *State v. Gardner*, 228 N.C. 567, 46 S.E.2d 824.

This assignment of error is overruled.

[12] On direct examination Sarakby testified that he observed defendant Cobb on 18 March 1974, and "he was bloody like he had been to a slaughter." Defendants contend that Cobb's objection should have been sustained and his motion to strike should have been allowed since the witness was giving his opinion of the defendant's appearance. This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts. *State v. Skeen*, 182 N.C. 844, 109 S.E. 71.

In *State v. Sterling*, 200 N.C. 18, 156 S.E. 96, it was held to be proper to allow a witness to state that the defendant's face "appeared to me as the face of a man who had taken a hasty shave with a dull razor in cold water." In *Skeen*, supra, this Court held that it was proper to allow testimony that the defendant's shoes were muddy and "[d]idn't look like they had been unlaced in several days."

[13] In our opinion, Sarakby's description of defendant Cobb was a permissible expression of opinion under the "shorthand statement of facts" exception to the opinion evidence rule.

[14] Defendants also contend that the rule prohibiting expressions of opinion by lay witnesses was violated when Sarakby was permitted to testify that Walters and Spaulding were referring to Griffiths when they made statements that they had killed "him." Defendants did not object to the district attorney's question until after the witness had responded. This assignment of error is deemed waived since defendants did not object until after the answer had been received even though grounds for the objection were obvious after the question had been asked.

> . . . [I]t is well settled that an objection must be interposed to an improper question without waiting for the answer and, if the objection is not made in apt time, a motion to strike a responsive answer is addressed to the discretion of the trial court except where the evidence is rendered incompetent by statute. [Citations omitted.]

State v. Perry, 275 N.C. 565, 169 S.E.2d 839. Even had the evidence been improperly admitted, it is evident that the witness must have referred to Griffiths since there is nothing in this record to indicate other murders in which these parties were involved. We cannot perceive how the jury could have been misled or defendant prejudiced by the admission of this evidence.

[15] Upon his cross-examination, the State's witness Sarakby at first refused to answer several questions. Defendants contend that they were thereby denied their right to a full and fair cross-examination. They rely on the case of *Bank v. Motor Co.*, 216 N.C. 432, 5 S.E.2d 318. A cursory examination of the case cited by defendants in support of their contentions reveals significant distinguishing features. In *Bank*, one of the chief witnesses answered several immaterial questions, and then refused to answer any further questions. Conversely, in the present case Sarakby initially refused to answer several questions, but after some hesitation did freely respond to questions. Certainly defendants were not prejudiced by this witness's original reluctance to answer questions on cross-examination. The insignificance of these matters is highlighted by the failure of defense counsel to attempt to "sift" the witness. This assignment of error is overruled.

[16, 17] On direct examination, Haywood Lindsay testified that he saw defendant Walters in the vicinity of the library and Walters "looked like he had been to a hog killing." Following a motion to strike this testimony, the trial judge granted the motion to strike and instructed the jury to disregard the statement "looked like he had been to a hog killing." Defendants contend that the trial judge erred by repeating the statement in the exact words of the witness. When a motion to strike is granted, the trial judge should instruct the jury to disregard the stricken evidence. It is presumed that the jury will follow such instructions. *State v. Self*, 280 N.C. 665, 187 S.E.2d 93; *State v. Moore*, 276 N.C. 142, 171 S.E.2d 453; *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334; *Wilson v. Mfg. Co.*, 120 N.C. 94, 26 S.E. 629. Here the trial judge properly instructed the jury to disregard the objectionable testimony. It was necessary for him to repeat the language objected to so that the jury would clearly understand the portion of the evidence which it should not consider in reaching its verdict. We find no merit in this assignment of error.

All defendants contend that the trial court erred in allowing the State to present witnesses whose names had not been furnished to defense counsel prior to jury selection. In this assignment of error, defendants argue that the State's failure to furnish a complete list of the State's witnesses denied them their "inherent right" to examine jurors on *voir dire* as to their relationship to the State's witnesses. Pursuant to defendants' request, the district attorney did give defendants a list of witnesses that the State intended to present, but this list did not include the names of three witnesses, James Goddard, James Walker and Roy Harrison. In *State v. Hoffman*, 281 N.C. 727, 734, 190 S.E.2d 842, 847. Justice Sharp (now Chief Justice) stated for the Court:

> "The common law recognized no right of discovery in criminal cases." *State v. Goldberg*, 261 N.C. 181, 191, 134 S.E.2d 334, 340 (1964). *In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. McDaniel v. State*, 191 Miss. 854, 4 So.2d 355 (1941); *Padgett v. State*, 64 Fla. 389, 59 So. 946 (1912); *State v. Matejousky*, 22 S.D. 30, 115 N.W. 96 (1908); 21 Am.Jur.2d *Criminal Law* § 328 (1965); 16 C.J.S. *Criminal Law* § 2030 (1958). There is no such statute in this State. [Emphasis ours.]

See also *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106.

We note that a legislative proposal which would have required the State to furnish a list of witnesses the district attorney intended to call at trial was deleted from the Criminal Procedure Act when it was adopted by the General Assembly. See Official Commentary following G.S. 15A-903 (1975).

[18–20] It is within the discretion of the trial judge to decide whether a witness shall testify when his name does not appear on a list of witnesses which the State elects

to furnish defense counsel prior to trial. The Judge's ruling will not be reversed absent a showing of abuse of discretion. *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336. Under such circumstances, we think it to be the better practice before ruling for the Court to interrogate the jurors as to their relationship with the tendered witnesses. Although this procedure was not followed here, we find no prejudice to defendants. The testimony given by these witnesses did not relate to essential elements of the crime charged, but only to the discovery of and chain of custody as to certain exhibits. Defense counsel could not have been misled or surprised by the omission of the names of the witnesses Goddard, Walker and Harrison from the list furnished by the State since they must have anticipated the offer of these exhibits into evidence. This assignment of error is overruled.

Defendants contend that the trial judge erred by overruling their objection to a question by the solicitor to the witness Pridgen.

During witness Pridgen's cross-examination, the solicitor asked him, "Listen to me and answer me carefully. If you are the man who concealed the gun in the radio that kidnapped Dr. Edwards down here at Scotland Neck. . . ." The witness answered, "No I did not." Pridgen was a prisoner serving time for conviction of a felony.

[21-23] A witness may be cross-examined by asking disparaging questions concerning collateral matter relating to his criminal or degrading conduct; however, the questions must be asked by the solicitor in good faith. *State v. Williams*, 279 N.C. 663, 185 S.E.2d 714; *State v. Ross*, 275 N.C. 550, 169 S.E.2d 875, cert. denied, 397 U.S. 1050, 90 S.Ct. 1387, 25 L.Ed.2d 665; *State v. Griffin*, 201 N.C. 541, 160 S.E. 826. The limits of proper cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held to be error in the absence of a showing that the jury verdict was improperly influenced thereby. *State v. McPherson*, 276 N.C. 482, 172 S.E.2d 50; *State v. Stone*, 226 N.C. 97, 36 S.E.2d 704; *State v. Beal*, 199 N.C. 278, 154 S.E. 604. Since the solicitor's question related to collateral matter the witnesses' negative answer was conclusive and rendered the question harmless. *State v. Ross* supra. This record does not disclose bad faith on the part of the solicitor in asking the challenged question. Even assuming, *arguendo*, that the question was asked in bad faith, we cannot conceive that a single question directed to this witness, a convicted felon, concerning his prior misconduct would have affected the jurors in reaching their verdict.

This assignment of error is overruled.

Defendants each contend that the trial judge committed prejudicial error by permitting the use of armed prison guards and allowing the presence of armed officers in and around the courthouse and in the presence of the jury during the course of the trial.

[24] It is the duty of the trial judge, in the exercise of his discretion, to regulate the conduct and the course of business during a trial. The exercise of this discretion will not be reviewed absent a showing of abuse of discretion. 75 Am.Jur.2d Trial, § 30, pp. 142, 143; *State v. Kirkman*, 234 N.C. 670, 68 S.E.2d 315; *State v. Vann*, 162 N.C. 534, 77 S.E. 295.

[25] Among the witnesses appearing in this case were three men convicted of murder, two men convicted of felonious breaking and entering, one man convicted of felonious larceny, [illegible] men convicted of armed robbery and one man convicted of assault with intent to commit rape. The three defendants, charged with first-degree murder, were inmates of Caledonia Prison Farm. Under these circumstances, it would seem reasonable for the trial judge to take strong security precautions. Further the trial judge knew the atmosphere and emotional climate which existed in the court-

room. We do not have the benefit of this knowledge. The presence of these armed officers and guards could add little in the way of fear to the courtroom atmosphere produced by the evidence picturing a vicious crime of violence committed upon a prison background.

We hold that the trial judge did not abuse his discretion by ordering or permitting strong security measures during the course of this trial.

[26] Finally all defendants contend that the imposition of the death penalty is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. The constitutionality of the death sentence has been uniformly upheld in numerous recent decisions of this Court. *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607; *State v. Robbins*, 287 N.C. 483, 214 S.E.2d 756; *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80; *State v. Wetmore*, 287 N.C. 344, 215 S.E.2d 51; *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60; *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742; *State v. Burns*, 287 N.C. 102, 214 S.E.2d 56; *State v. Boyd*, 287 N.C. 131, 214 S.E.2d 14; *State v. Armstrong*, 287 N.C. 60, 212 S.E.2d 894; *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335; *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19. We adhere to the holdings in these cases.

Because of the seriousness of these cases, we have carefully examined this entire record. Our examination does not disclose such prejudicial error as would justify the granting of a new trial or that the judgments be disturbed.

No error.

SHARP, Chief Justice (dissenting as to the death penalty).

The murder for which defendants were convicted occurred on 18 March 1974, a date between 18 January 1973, the day of the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette*, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendants by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra*, 282 N.C. at 453 and 476, 194 S.E.2d at 30 and 47.

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

EXUM, Justice, dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 439, 212 S.E.2d 113, 121 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

James B. ADDER

v.

HOLMAN & MOODY, INCORPORATED.

No. 26.

Supreme Court of North Carolina.

Nov. 5, 1975.

A vehicle owner instituted action for damages for injuries allegedly resulting

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CARDELL SPAULDING,
JOE LEE COBB and
VERNON RICHARD WALTERS

V

STATE OF NORTH CAROLINA

****

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

****

The undersigned, W. Lunsford Crew, William F. Dickens, Jr., and H. P. McCoy, Jr., Attorneys for the Petitioners Cardell Spaulding, Joe Lee Cobb and Vernon Richard Walters, ask leave to file the attached Petition for a Writ of Certiorari to the Court of Appeals of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioners' affidavit in support of this motion is attached hereto.

Respectfully submitted,

W. LUNSFORD CREW
100 BECKER DRIVE
ROANOKE RAPIDS, NORTH CAROLINA 27870
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ATTORNEY FOR PETITIONER WALTERS

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NO._____

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CARDELL SPAULDING,
JOE LEE COBB and
VERNON RICHARD WALTERS

V

STATE OF NORTH CAROLINA

****

AFFIDAVIT

****

We, Cardell Spaulding, Joe Lee Cobb and Vernon Richard Walters, first being duly sworn according to law, depose and say, in support of our motion for leave to proceed without being required to prepay costs or fees:

1. We are the Petitioners in the above entitled case.

2. Because of our poverty we are unable to pay the costs of said cause.

3. We are unable to give security for the same.

4. We believe that we are entitled to the redress we seek in said case.

5. The nature of said cause is briefly stated as follows:

Cardell Spaulding, Joe Lee Cobb and Vernon Richard Walters were charged in separate bills of indictment with the first degree murder of James Thomas Griffiths on March 18, 1974 in Halifax County, North Carolina, under North Carolina General Statutes § 14-17. All of the Petitioners and the victim were inmates of Caledonia Prison on the date of the murder. The trials of the three Petitioners were consolidated upon motion of the State and over the objection of each Petitioner, which trial was held during the November, 1974 Halifax County Superior Court Term. Each Petitioner entered a plea of not guilty and none of the Petitioners testified in their own behalf. The jury returned verdicts of guilty as charged in the indictments as to each Petitioner and the Trial Judge imposed the death penalty upon each of the Petitioners, to which the Petitioners entered objections based on the death penalty being a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The trial Court overruled each of these objections.

The Petitioners gave notice of appeal in open court after the Trial Judge imposed the death penalty, which appeal was perfected to the Supreme Court of North Carolina. On November 5, 1975, the Supreme Court of North Carolina affirmed the conviction of the Petitioners and found no error in the trial.

Attorneys for the undersigned Petitioners filed a request for a stay of execution with the Supreme Court of North

Carolina on November 20, 1975, which was granted by the Supreme Court of North Carolina upon the condition that a Petition for a Writ of Certiorari be filed in this cause with the United States Supreme Court.

Cardell Spaulding
Cardell Spaulding

Joe Lee Cobb
Joe Lee Cobb

Vernon R. Walters
Vernon Richard Walters

Subscribed and sworn to by Cardell Spaulding before me, this the 20 day of January, 1976.

Edward E. Hodge
Notary Public

My Commission Expires: My Commission Expires October 6, 1980

EDWARD E. HODGE NOTARY PUBLIC WAKE COUNTY, N.C.

Subscribed and sworn to by Joe Lee Cobb before me, this the 20 day of January, 1976.

Edward E. Hodge
Notary Public

My Commission Expires: My Commission Expires October 6, 1980

EDWARD E. HODGE NOTARY PUBLIC WAKE COUNTY, N.C.

Subscribed and sworn to by Vernon Richard Walters before me, this the 20 day of January, 1976.

Edward E. Hodge
Notary Public

My Commission Expires: My Commission Expires October 6, 1980

EDWARD E. HODGE NOTARY PUBLIC WAKE COUNTY, N.C.

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CARDELL SPAULDING, JOE LEE COBB,
and VERNON RICHARD WALTERS,

Petitioners

v.

STATE OF NORTH CAROLINA,

Respondent

****

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA

****

RUFUS L. EDMISTEN
Attorney General

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Telephone: (919) 829-2011

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